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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

ORACLE AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	**NO. CV 10-03561-WHA**
	)	
GOOGLE, INC.,	)	
	)	
Defendant.	)	
	)	

San Francisco, California
Thursday, September 22, 2016

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on the next page)

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Thursday - September 22, 2016 **10:32 a.m.**

P R O C E E D I N G S

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THE CLERK: Calling Civil Action 10-3561, Oracle America, Inc., vs. Google, Inc.

Counsel, please approach the podium and state your appearances.

MS. HAAG: Good morning, Your Honor. Melinda Haag on behalf of the responding parts: Ms. Hurst, Orrick, Herrington & Sutcliffe, and Oracle.

THE COURT: Welcome to you.

MS. HAAG: Thank you.

MR. BABER: Good morning, Your Honor. Bruce Baber for King & Spalding for Google.

THE COURT: Welcome to you.

MR. VARIAN: Good morning, Your Honor. Robert Varian. I'm with Ms. Haag representing the same parties.

THE COURT: Welcome. Others are at the counsel table, but I will leave it to you two if you want to introduce them or not.

This is a motion for contempt. The courtroom has got a lot of people out, there so I'm going to order you not to refer to or reveal the attorneys-eyes-only information or confidential information without getting my okay first, in which case I might excuse everyone from the courtroom.

All right. So let's hear the moving argument.

MR. BABER: Thank you, Your Honor.

I do have -- at counsel table with us this morning is my partner, Joseph Wetzel, from our San Francisco office, and Renny Hwang from Google.

THE COURT: Great. Welcome.

MR. BABER: Your Honor, we appreciate your giving us some time to be heard on this, and I'll try to be brief.

The motion we filed presents two separate but related and, we say, equally-important issues about protective orders and compliance with them.

The first issue is may an attorney, who has received and been entrusted with confidential information under a protective order, disclose that information in open court, regardless of who is present.

In this case, we are using the Court's standard protective order for the Northern District. The language that's at issue is from the form, and the question is whether the language of that form means what it says when it says an attorney who has confidential information can only disclose it to people in the categories listed.

We think it's the Court's role to decide who gets to hear information that's been designated confidential and may be disclosed in open court. It is not appropriate and we believe it is prohibited by the protective order for an attorney to

simply share that information, disclose it publicly, without the Court's ruling in advance.

So we think the answer to that first question is no. If a lawyer has information designated confidential under the protective order, that lawyer cannot disclose it to anyone other than people that the protective order permits disclosure to be made to.

The second question in this case in particular is once there has been a disclosure, once we know that an attorney has disclosed confidential information to someone who is not in a category that is permitted to get a disclosure under the order, does that lawyer have to take steps to limit the effects of the disclosure that was made. Is there an obligation to cooperate so that the information that's been disclosed doesn't get disseminated any further.

We think the answer to that question, under the plain language of the protective order, is yes. The protective order contemplates that sometimes mistakes happen. Sometimes information that's been designated confidential does get disclosed to people that it shouldn't be disclosed to. But it also puts on the lawyer, or anyone else who has confidential information, an obligation to use the best efforts to make sure there is no further dissemination. And we think in this case, Your Honor, it's pretty straightforward both on the facts and the law.

There is really no dispute that Oracle's counsel, in open court before Judge Ryu at a hearing on a discovery dispute -- and we know that there was at least one member of the media present -- made a disclosure of confidential information, not just of Google, but of a third party, Apple, that had been designated *attorneys' eyes only* under the protective order.

I don't believe, Your Honor, there should be any serious question as to whether or not that was a violation of the order. While the order permits disclosure to the Court for sure -- protective orders always have to permit disclosure to the Court -- but the protective order says you can only disclose the information to the Court, qualified experts, etc. It does not anywhere contemplate, suggest, or permit a disclosure to members of the press or members of the public.

Those are not -- in their brief, Oracle characterized these as boilerplate provisions of the protective order. These are not boilerplate provisions. That's the core provision of the protective order, is if you, as a lawyer, as an officer of the Court -- if you get confidential information you are told you are now under a court order that you may only disclose it to people in these certain boxes and if you make a disclosure to someone who is not in one of those boxes, I think under the plain language of the order, it's a violation.

Now, once the disclosure happened in this case -- Your Honor, what happened shouldn't have happened. Okay. Once

the disclosure was made, Google's counsel immediately said, *Wait, wait a minute. That's confidential. That's from a confidential deposition. It should be under the protective order.*

Judge Ryu asked, *Is that true*, and Oracle's counsel said *Well, yes, it is from a confidential deposition, but, you know, there has been media reports about this,* etc.

Your Honor, that answer should have been, *Yes. Sorry. It's confidential. We should seal the transcript.*

That didn't happen.

We believe that violated the protective order, and it went on from there. We've cited in our brief the next -- a couple days later, Google wrote a letter asking Oracle to please join in a motion to seal the transcript. Oracle didn't even respond to that.

Google had to file multiple motions in front of Judge Ryu to get that information sealed. And she ultimately sealed it. So she found there was good cause to seal that transcript and keep that information confidential.

But at every turn, Oracle, instead of simply just saying, *Yes, we see Google's put in a declaration, Apple has put in a declaration; this is confidential information; we agree it should be sealed,* they said, *Well, we take no position; here's the reasons why the disclosure was okay.* It was anything but cooperating in limiting the damage from the protective order

breach.

And these issues, they're not academic. Okay. The information that was disclosed at that hearing in front of Judge Ryu became headline news, headline business news. There were articles all over the Internet quoting the transcript and quoting the disclosure by Oracle's counsel that said, *We've always wanted to know what these numbers are like regarding this Google/Apple deal. Well, now we know because here is what happened in court.*

A few weeks later, Your Honor, we still had -- I don't know if you recall, there was some final cleanup document discovery with some third parties. Well, another third party, LG Electronics, came into court. They filed a motion for protective order with Judge Ryu citing what had happened with the Apple data, and they asked Judge Ryu for additional protection for LG data. So we have third-party data involved here. It was Apple's information as well as Google's.

Your Honor, that is exactly the type of information that protective orders are intended to protect. And the consequences, the results that occurred here, are exactly the kinds of harm that protective orders are supposed to guard against.

We have to have protective orders for the discovery process to work. We all know that. But they have to be obeyed and respected in order for them to perform their necessary

function.

And the Court, opposing parties, and certainly third parties have to be able to expect scrupulous compliance for protective orders to be effective.

And as I said earlier, we all live in this world nowadays with protective orders. We always have to be aware *am I about to say something that is covered by a protective order*? And if you are, you need to have the judge know that. You need to let the other side know that.

But sometimes things happen. Okay. We all know that. There but for the grace of God go I. But when it does happen, the answer is not to dispute that there was a problem, refuse to cooperate, taking very simple steps that could have addressed it, and, instead, requiring the other party and a third party to have to spend money filing motions, filing declarations, explaining why the information is confidential, and then having Judge Ryu have to take time to rule on that.

I'm going to come back to the two legal issues in a second, but I also want to just touch on a couple of things about what this motion is not about, because in the briefs, Your Honor, I think there is a lot of red herrings that are floating around here.

First of all, this is not about open and public trials or the procedures that might be appropriate when confidential information needs to be used at trial. This was a discovery

dispute, and *Kamakana* made clear that there is very different standards at trial or on dispositive motions than in a discovery dispute context.

The motion is also not about whether information can be disclosed to the Court. Of course it can. The protective order says it must, you have to permit that. We absolutely do not quarrel with counsel's ability to share confidential information with the Court. We have the procedures for filing under seal for written documents, and in court at any time, a lawyer is free to say, *Your Honor, I have information that is under the protective order. Can I share it?*

And, in fact, Your Honor, we've had a fairly consistent history in this case of exactly that happening. I went back and looked at several of the transcripts back during Phase 1. We had hearings where Mr. Holtzman from Boies Schiller came to the Court and he said, *Well, Your Honor I have documents, but Google designated them attorneys' eyes only*, and you said to him, *Fine. Please tell me what's in them.*

We have situations where Google had documents that Oracle had designated as confidential, and Mr. Van Nest stood up and said, *Your Honor, I have some -- an argument I would like to make based on some Oracle documents that are designated confidential.* Mr. Jacobs said, *It's okay. We de-designate them. You can share those in open court.*

So that's always a possibility. But it's not appropriate

for a lawyer to simply share the information without warning and without flagging for the Court and for opposing counsel and for third parties that it's confidential.

Your Honor, this motion is also not about trying to punish anyone. Given the issues that have been raised, we believe it is important for this Court to clarify these issues about the standard protective order. Is it the case, as Oracle argues, that as long as I'm directing my comments to the Court, I can just share whatever confidential information I want, regardless of who is back there?

This is the protective order that is used in this district in lots and lots and lots of technology cases. And if that is its meaning, that should be clarified. I think, frankly, Your Honor, that would come as a surprise to most lawyers.

THE COURT: All right. Are you done?

MR. BABER: Almost, Your Honor.

I will just say I think the two core legal issues, the protective order itself, categories of people you can disclose to, only those people.

And then the other issue Oracle raises is Your Honor's order that you entered when you approved the protective order when you said once something is used in open court, it's no longer protected, absent a further order of the Court.

Just like the protective order doesn't permit a lawyer to stand up and share confidential information, we don't believe

your order gives you carte blanche to use whatever you want in open court. I think your order was clear. It was your order, Your Honor, and you can tell us what it means, but I think what your order says is once a decision has been made that the information can be used in open court, then it is up to the Court to decide whether any further protection is appropriate.

So we don't think there is any issue here that there is ambiguity in the protective order, some reasonable good faith interpretation that what happened was not a breach. We think the language of both orders is clear, and we think the orders were violated as a result.

Google had to spend significant money filing multiple motions, dealing with LG, etc., in order to undue the effects of the disclosure. And we think we are entitled to a compensatory award for what it cost Google to deal with that once the violation occurred.

THE COURT: All right. Thank you.

MS. HAAG: Thank you, Your Honor.

Your Honor, the question before the Court is different, in my view, from what has been framed by Mr. Baber. The question before the Court is whether the Court should hold an attorney, a respected trial attorney, and by extension, her law firm and her client, in contempt of court and impose sanctions, which involves a finding of bad faith based on the circumstances of this case. So I think it's important for the Court -- for us

to step back, and if the Court will indulge me, to allow me to explain to the Court what happened in this case before the Court rules.

So January 14th of this year, there was a hearing before Judge Ryu. It was a discovery dispute. Discovery had closed. The expert reports were in process. Trial was set for May, and as we know, trial started in May just a few months later.

Oracle believed that they were missing critical information -- the experts that Oracle was working with believed and were telling Oracle ***We are missing critical information for our analysis. We have not gotten it through discovery.*** Despite the fact that Google proffered a 30(b)(6) witness to provide that information, the information that was provided by that witness was very vague, very conclusory, limited as to time, and it was not what the expert needed, and that is what the expert was communicating to Oracle and its counsel. So this was critical information just a few months before trial. So Oracle seeks a discovery proceeding before Judge Ryu, and that proceeding took place on January 14th.

So there is really two sets of information. Mr. Baber kind of puts it together, but there is really two issues that arose out of the hearing, and they are very different.

First, there was an exchange between Judge Ryu and Ms. Hurst that went on for at least 10 pages. It started with a question from Judge Ryu to Ms. Hurst. She wanted Judge Ryu

to explain how the requested information was relevant to the apportionment of profits and what period of time was relevant.

That question led to at least a ten-page back and forth very fulsome, detailed discussion between the judge and Ms. Hurst. In the course of that back and forth discussion in response to the Court's question, Ms. Hurst revealed information, two numbers, that are now the basis of this motion. So I'm not -- I'm referring to it in code, but two numbers --

THE COURT: Two numbers?

MS. HAAG: I think that Google calls it the Google or the Android information. Ms. Hurst talked about those numbers -- mentioned those numbers in that back and forth.

Google expressed no objection, no concern at any time during the hearing with the revelation of those two numbers.

THE COURT: I think I read that Mr. Van Nest jumped up and said that was confidential right away.

MS. HAAG: No, Your Honor, that's different. So this starts -- this takes place starting on Page 4 of the hearing transcript, Pages 4 through 13 of the transcript. And there's no objection. Let me -- I'll pull the transcript for you. But it starts on Page 4.

THE COURT: All right. Well, I think where the objection was made was 29.

MS. HAAG: Right. So that's why it's important,

Your Honor, to really be detailed about this and to parse it out.

So Ms. Hurst is talking to the Court, and in that ten-page back and forth mentions two numbers that counsel calls the Google or the Android numbers. Again, there is no objection to those numbers being mentioned in court, there is no concern expressed by Google at any time during the hearing. There are meet and confer discussions after the hearing concludes where counsel is working out an order between them. Google never mentioned during those five days of meet-and-confer discussions that there was a concern about these numbers being revealed during the hearing.

On January 19th, five days after the hearing, Google sent a letter to Ms. Hurst and Mr. Bicks. In that letter, Google raised a concern about -- for the first time about the revelation of this Google or Android number. That was the first time it was raised by Google as a concern. That was January 19th. On January -- and in that letter, Your Honor, Google asked Oracle to join a motion to seal those numbers from the transcript.

Two days later on January 21st, Oracle, through counsel -- and this gets more complicated and I'll fill this in in a minute -- responded to Google in a court filing taking no position with respect to that request. So in terms of not being helpful, as Mr. Baber claims, two days after Google asked

for this material, these numbers, these Google/Android numbers to be sealed, Oracle said, you know, *we take no position*. In other words, *we don't object*.

So those are the facts with respect to the Google or Android numbers, Your Honor. No objection.

Two days after Google raised the concern, Oracle filed something in court that took no position, essentially not objecting to that information being sealed.

And Google is asking you to hold Ms. Hurst, her law firm, and her client in contempt for revealing those numbers in court, for which there was no objection raised during the hearing, and the first time there was ever any concern raised was five days after the hearing. They're asking you to hold her in contempt for that.

Now I want to turn to the Apple information, which is, I think, what the Court was referring to. So back to the January 14th hearing.

Later in the hearing, there is the exchange, the discovery-related exchange. Oracle said during the hearing that -- I'm sorry. Oracle said, of course during the hearing, that it didn't have everything it needed. Again, I'm trying to speak in code a little bit, Your Honor, so I apologize.

Oracle said during the hearing essentially, *We don't have what we need. That's why we are here before you, Judge Ryu*. Google's counsel said they do have -- *Oracle does have what it*

needs, Your Honor, represented that to the Court.

Oracle, through Ms. Hurst, says, *No, we don't, Your Honor. That's why we're here. We don't have the information we need.* She was trying to -- Ms. Hurst was trying to explain to Judge Ryu why it is we don't have what we need. This ping pong goes bank and forth between counsel for Google and counsel for Oracle where counsel for Google is saying *they have everything they need* and counsel for Oracle is saying *no, we don't*.

So this discussion goes back and forth. Then the parties start talking about sort of other, but related, matters, and now deeper into the hearing where you start -- where you do see the objection, Mr. Van Nest, on behalf of Google, once again says, *By the way, Oracle has what it needs. The 30(b)(6) witness provided it. Oracle has what it needs.* And, you know, essentially, *We shouldn't be here*.

Ms. Hurst, at that point, was trying to figure out, *How do I illustrate to the Court that we don't have what we need? That what was said in this 30(b)(6) transcript was vague and limited to time and it's not helpful and it's not what we need. How can I convey that to the Court*?

She wasn't planning to do this. She did not have the transcript, the deposition transcript, with her. She had to get one of the people from Orrick to pull it up on a computer, on a laptop. She brought up it to the lectern, and to illustrate to the Court that what this witness said during this

30(b)(6) deposition is not enough, it's not helpful, she paraphrased what he said on the record.

It was at that point that counsel for Google did object, and Judge Ryu, expressing a little skepticism, essentially took it under submission. She said, *I'm not going to rule right now. I'll address it later.* And then they moved on. There was no further discussion of it during the hearing. The hearing continues. They move on.

What's apparent, got to be apparent to everybody, is the Court is holding a calendar, so there are people in the courtroom because the Court had -- just like this morning, the Court had a calendar. So it had to be apparent to Mr. Van Nest that there were people in the courtroom. It had to be apparent to Judge Ryu that there were people in the courtroom, as well as to Orrick, of course. No one expressed a concern about the fact that there were people in the courtroom when this number was discussed by Ms. Hurst. The parties simply went on and wrapped up the hearing.

Judge Ryu ultimately suggested and brokered a compromise between the parties. Oracle would get the information that it needed and Google would be able to mask certain information, redact certain information from that. That was a suggestion by the judge. It was a good suggestion. It was a compromise. The parties accepted that. Of course, everybody talked about the fact that the devil is in the details, and so the Court

ordered them to meet and confer. She asked them to submit then an order on January 19th, which was five days later.

So the parties met and conferred over that five-day period. Again, Google didn't raise any concern about the Google/Android numbers, and I don't believe they discussed the Apple issue either.

On January 19th, as I said, Mr. Van Nest sent a letter to Ms. Hurst and Mr. Bicks. For some reason, the letter is also sent directly to Oracle in-house counsel. I'm not sure why that was done. But in any event, a letter was sent on January 19th at 11:49 in the morning. That letter, for the first time, raised the concern about the Google/Android number. It re-raised the concern about the Apple number. And it asked Oracle and Orrick to join in a motion to seal those portions of the transcript.

They asked in the letter for a response by noon the next day, January 20th. So the letter is received by email at 11:49 in the morning on January 19th. Three and a half hours later at 3:30 in the afternoon, before anybody had a chance to deal with this, and the deadline that Google asked for was noon the next day -- at 3:30 Judge Ryu issued an order. She hadn't forgotten the request to seal the transcript that had been made orally with respect to the Apple number. So at 3:30 in the afternoon, she issued her order, that she had essentially taken under submission, denying Google's request to seal that portion

of the transcript.

So at that point, Orrick -- and, of course, as I know you understand from your time in private practice, this is the lead-up to trial, everybody is frantically busy, there is an awful lot going on. At that point Orrick and Oracle think *Well, this is taken care of. The judge has ruled on this request. The judge has denied that request, and it's taken care of.*

On January 20th, so the day after the Court issued the -- well, one more thing. The Court denied the motion to seal on January 19th, and the transcript was actually made available to the public 25 hours later. So at 4:30 the next day on January 20th, it was available to the public.

On January 20th, Google filed a motion for reconsideration. They actually -- it was procedurally deficient. It was bounced by the Court because the motion for reconsideration they filed was a motion for reconsideration of the Apple number because that truly was reconsideration because the Court had ruled on it, but they lumped in, like they did today, this Google/Android number. The Court actually bounced it and said this is procedurally incorrect. You need to separate these two things. So that's part of all the briefing that needed to be done. It was because of that issue.

So on January 20th, Google files the motion for reconsideration. It's bounced. On January 21st, the next day,

they have to re-file. So they file it procedurally correctly the next day on the 21st.

On that same day, Oracle/Orrick filed a response and took no position to the relief they were requesting, which was sealing the transcript on January 21st. And on January 22nd, Judge Ryu, I'm guessing, because she now sees here is the motion, it's procedurally correct, and Orrick and Oracle don't appear to be contesting it, she sealed the transcript at that point, January 22nd, pending her further ruling. And then she ultimately ruled on the motion for reconsideration and the motion and gave Google most of the relief that it was seeking.

The Court, Judge Ryu, did not deal with all the back and forth in the papers about whether there was a violation of the protective order, whether there was contempt, whether there was bad faith or malevolent conduct. She sort of put all of that aside. She simply looked at it and decided, *There is good cause. That's the standard. And I'm going to seal this information.*

So those are the facts. I think it's important for the Court to understand that, to separate out the Google and Android number from the Apple number, and to understand really what happened here because Google is asking you, based on those facts, to hold Ms. Hurst in contempt of court, to hold Orrick in contempt of court, and to hold Oracle in contempt of court, and to impose sanctions, which requires the Court to make a

finding of bad faith. And I submit to Your Honor that there is no bad faith here and that it's not appropriate to hold these parties in contempt on these facts.

If the Court doesn't have any question about the facts, I'm happy to talk a little bit about the legal standards as well.

THE COURT: Well, do you admit that she should not have revealed this to the Court in the way she did?

MS. HAAG: Well, Your Honor, to answer that question, I think I do need to go through the legal standard, if the Court will indulge me once again on that, because what we're talking about is holding a party in contempt.

THE COURT: What?

MS. HAAG: What we are talking about is holding a party in contempt.

THE COURT: We are also talking about Rule 37.

MS. HAAG: Well, yeah, and there's an interesting point about Rule 37 as well that I would like to address.

THE COURT: I see you're dodging -- this doesn't help me any. You're dodging it. I think you're afraid to just come right out and admit she screwed up. She should never have done what she did.

MS. HAAG: Well --

THE COURT: And whether it's good faith, bad faith, or whatever, you're not helping me out. Because to my mind, she

should never have done that.

I practiced for 25 years and 17 years in this job, and the uniform practice in this district and everywhere else I practiced in the United States was if you got attorneys' eyes only, you tell the judge, *I would like to give you this, Judge, but it's under this protective order. I have to have your permission or hand it up to you. I can just hand you a copy, and let you look at it right now.* That's the way it's worked. I bet you would admit it, too. If she was on the other fence, you would be jumping up and down about how they violated the protective order.

So I think it's important for you to own up to it and admit that it was a violation.

MS. HAAG: Well, Your Honor --

THE COURT: It takes away from the rest of your very good argument that you made that you won't make that concession.

MS. HAAG: Well, I understand, Your Honor, and even assuming a violation of the protective order --

THE COURT: All right. Go ahead. This is not helping me.

MS. HAAG: I understand, Your Honor. I would like to talk about the --

THE COURT: It's really -- your firm is one of the biggest litigators in America, and next time you go into a

court somewhere and ask for confidential documents, I hope somebody raises this and says, *Your firm violated that order and wouldn't even admit it. And why should we, in this next case, give your firm access and have it treated the same way with the same disregard that it was treated in this case.*

MS. HAAG: I understand, Your Honor. I would like to talk about the standard for contempt because that's what --

THE COURT: I'm not going to say -- I'm very -- I'm not going to say *never*. I'm going to reconsider this, but I'm more inclined to just say she violated Rule 37. That has a much different standard. You don't have to get into good faith/bad faith, but make it very clear this was a violation.

And it disappoints me to no end that a firm of your caliber would have done this because we depend on good lawyers like you and Ms. Hurst to do it the right way instead of arguing it. Even today you won't admit that it was a violation of the order. How can we run litigation if you are going to be allowed to broadcast out information like that? You know that's the right answer, and you just won't admit it.

MS. HAAG: Well, Your Honor, I certainly understand the Court's concern. My focus was on the fact that Google is seeking -- seeking an order of the Court --

THE COURT: Let me stop you there.

Mr. Baber, if I were to hold this was a violation of the protective order and Rule 37, you get your cost of your motion,

why isn't that enough? Why do you need contempt?

MR. BABER: We don't, Your Honor. If you look at our papers --

THE COURT: I'm not going to go with contempt. I'm going to just say --

MR. BABER: You don't have to. Violation of the order --

THE COURT: -- Rule 37 -- it was a violation of the protective order to do what she did, but I don't have to say it was bad faith.

MR. BABER: You don't. That's absolutely, right.

THE COURT: Why what do you say to that point? Is that satisfactory to you?

MS. HAAG: Well, with respect to -- for the Court to impose sanctions, the Court does have to make a finding --

THE COURT: No, I don't. Read 37. Rule 37 says they automatically win unless you have substantial -- the burden shifts to you totally. The burden is not on them. Read Rule 37.

MS. HAAG: I have it here, Your Honor.

So there are two cases that we cite. And I actually have more, and I apologize that I --

THE COURT: You are pushing me to the direction that I have to find bad faith. If you want me to do that, I might.

MS. HAAG: Well, Your Honor, I would like to discuss

the standard, if I may. If I may, because I do --

THE COURT: A lawyer like Ms. Hurst ought to have known that she did the wrong thing immediately.

MS. HAAG: I completely understand, Your Honor. The -- we cite two cases under 37(b)(2) that require, for a finding -- for sanctions under 37(b)(2) are only to be awarded in, quote, "extreme circumstances and where there is willfulness, bad faith or fault of the party." And there are two cases that we cite. One is *Fair Housing of Marin* and the other is *Adams vs. Albertson*.

THE COURT: All right. Just a minute.

It says, "If the motion is granted" -- "Payment of expenses. If the motion is granted, the Court must, after giving opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct or both to pay the movant's reasonable expenses."

Then it says, "But the Court must not order this payment if the movant filed a motion before attempting in good faith, the opposing party's nondisclosure was substantially justified, or other circumstances make an award unjust."

I don't see how you can read into that a willfulness requirement.

MS. HAAG: So, Your Honor, if you would look at *Fair Housing of Marin* and *Adams vs. Albertson*, those are two cases

that we cited --

THE COURT: I'm going to look at those. I will look at those two decisions.

MS. HAAG: And then I apologize. I have more for you. And if I could explain --

THE COURT: Yes.

MS. HAAG: -- Rule 37. So in looking back at Rule 37 -- and, frankly, late last night, Your Honor -- Rule 37(b)(2) on its face doesn't apply to counsel. Rule 37 -- the rule reads for not obeying -- "for not obeying a discovery order. If a party or a party's officer, director, or managing agent or a witness fails to obey an order," here's the sanction, including contempt.

So I think it's actually the Court -- it would be the Court's inherent authority, rather than authority under 37(b)(2).

THE COURT: It says "the party or the attorney advising that conduct or both to pay the movant's reasonable expenses in making the motion."

MS. HAAG: Well, I'm reading 37, Rule 37(b)(2)(A), Your Honor. I'm not sure what our disconnect is.

THE COURT: I may have the wrong one. Well, down at No. 2, (b)(2) --

MS. HAAG: (A).

THE COURT: "Failure to comply with the court order"

is (b; (2) is "sanctions sought in the district where the action is pending" and then (A), "for not obeying a discovery order."

MS. HAAG: Which some courts seem to be in -- courts seem to interpret *protective order* as a discovery order for these purposes.

THE COURT: Well, then if that's true, then all the way down to "Payment of expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, unless it was substantially justified."

So it does say "attorney advising that party" and this is a case where the -- I mean, are you really saying that I could hold Oracle in contempt, but not the attorney who --

MS. HAAG: No, Your Honor --

THE COURT: -- who actually did the deed?

MS. HAAG: No, Your Honor. It's just a technicality. I think it would be the Court's inherent authority --

THE COURT: I disagree with that. See, you're trying to push it off into the bad faith regime, and that's not what Rule 37 says.

Look, if you want me to make a finding of bad faith or good faith, if you want to push me that far, I'm willing to do it. I'm trying to avoid that. And I want you to know, Ms. Hurst is a respected member of the -- but very experienced.

And she would have been the first to make a motion if the shoe had been on the other foot. She knew she should not have done that.

Now, maybe in the heat of the moment, it was -- it was -- she felt that it was okay, but I -- I just believe that every good lawyer in this district, and certainly somebody with her experience, knows that you don't blurt it out in open court with the newspaper people there. You ask the judge, ***How can we handle this?*** You could hand up the document to the judge, you could ask to clear the courtroom, you could say, ***Can I submit this later under seal***? She just blurted it out.

MS. HAAG: Your Honor, and that's why I wanted to explain the facts to you. First of all, with respect to the Google/Android number, it didn't --

THE COURT: It's just the Apple number that mainly bothers me. It's the Apple number. There was an immediate objection.

MS. HAAG: There was, Your Honor. And that's why I tried to explain the context, which is there is this back and forth between counsel for Google and Ms. Hurst. Counsel for Google keeps insisting to the Court -- and it's actually a total of seven times throughout the hearing -- ***They have what they need. I don't know why we're here. The 30(b)(6) witness provided this information.*** It literally went back and forth like that seven times.

Ms. Hurst kept saying, *No, we don't.* Mr. Van Nest said, *Yes, they do.*

No, we don't.

Yes, they do.

In the back and forth of that, she just thought about *How do I illustrate to the Court that we don't have what we need*? And what she did is she pulled out the transcript and paraphrased it. So --

THE COURT: She blurted out the two numbers that mattered. That's not paraphrasing.

MS. HAAG: Well --

THE COURT: She blurted it out.

MS. HAAG: She didn't read from the transcript, is my point, Your Honor. Absolutely the numbers were revealed in court.

So it's -- it's not -- you know, there was -- there was no intent to violate the protective order. There was no bad faith in doing that. As soon as -- Oracle and Orrick did not object to the sealing of the transcript when it was requested by Google.

You know, it's just -- you know, what I would like to do is -- I know the Court doesn't want me to get into the legal standard for contempt, but I would like to, if the Court will indulge me because this is --

THE COURT: Go ahead. I think I know the standard,

but nevertheless, go ahead and make the point you wish to make.

MS. HAAG: So to hold a party in contempt, there has to be clear and convincing evidence of a violation of a specific and definite order of the Court. That's the *Bennett* case that we cite.

THE COURT: We don't have that here? You don't think we have clear and convincing evidence here? We got a protective order. What if this had been -- your argument comes down to this. That if she had had the recipe for Coca-Cola, she could have blurted that out to this courtroom right now.

MS. HAAG: Well, that fits into the legal standard for contempt, Your Honor, because I -- we're not arguing that at all.

THE COURT: Yes, you are. You won't even admit that it was a violation of the order.

MS. HAAG: So --

THE COURT: You want to say that it was okay under the order for her to do what she did.

MS. HAAG: I'm not saying it's okay. I'm saying she should not be held in contempt for doing so.

So there has to be clear and convincing evidence of a violation of a specific and definite order of the Court.

The case law provides that, "No one should be held in contempt for a violating an ambiguous order. There can be no contempt when an order purportedly violated is ambiguous or

when there is doubt or uncertainty in the minds to whom it is addressed. Contempt cannot be based on a good faith and reasonable interpretation of an order." And finally, "The Court has to resolve all doubts in favor of the accused." Those are the relevant legal standards for contempt.

So I submit, Your Honor, that there was doubt and uncertainty in the mind of Ms. Hurst about what the protective order provided. She had read the protective order. She saw that Paragraph 7 allowed disclosures to the Court, and she saw the addendum to the order in Paragraph 5 that seemed to contemplate that there would be disclosures of confidential information in open court.

THE COURT: Did her declaration actually say that that's what she thought back then?

MS. HAAG: I don't know that it's as clear as it could be.

THE COURT: I don't think it is. I think that was an after-the-fact thing.

MS. HAAG: Well, in preparing for this hearing, Your Honor, I have spent a lot of time talking about this --

THE COURT: That doesn't count. That doesn't count. It has to be under oath.

MS. HAAG: I understand. If the Court would like us to provide a further declaration --

THE COURT: You have made your record. I am not

asking you to do anything more. But I am aware of what -- you put a spin on it that is not supported by the sworn record.

MS. HAAG: I understand, Your Honor. We would like to submit a further declaration, if it's -- if the Court finds it appropriate.

THE COURT: The record has been made on this.

MS. HAAG: All right.

THE COURT: Don't ask me to tell you what's appropriate to do. So --

MS. HAAG: All right.

THE COURT: -- I think -- look, what more do you want to say?

MS. HAAG: Well, Your Honor, I submit to you that this is not an appropriate case for contempt. That there is -- this is not an appropriate case for sanctions. There was no bad faith in connection with the Google and Android numbers. No one, including Google, its outside counsel, its in-house counsel, who were also present, noticed or thought that there was anything wrong with disclosing those numbers in open court.

And, Your Honor, just one more point. It doesn't appear that Judge Ryu, who was actually presiding over this hearing, perceived a contempt had occurred in front of her. She's the one who was there.

28 U.S.C. 636 actually provides -- actually provides that if Judge Ryu perceives a civil contempt occurring in front of

her, she is required to certify that to the Court, certify the facts to the Court and essentially refer it to the Court. She didn't do that.

So, Your Honor, I would submit to you that whether there is clear and convincing evidence of a contempt, that is some evidence that there isn't because Judge Ryu, who was there, didn't see fit to certify it to the Court.

THE COURT: All right. Rebuttal.

MS. HAAG: Your Honor, could I ask for one more thing? Ms. Hurst is, of course, here. And if the Court would like to hear from her, she is more than willing to speak with the Court, under oath or otherwise.

THE COURT: The record has been made.

All right. Mr. Baber.

MR. BABER: Thank you, Your Honor. Very briefly.

I think this debate about contempt or a violation of the order, those are one and the same.

THE COURT: Answer this question. Ms. Haag cites to two decisions -- I have forgotten the name that I'm going to look at -- and says that Rule 37 requires bad faith. Now, that's not the way I read the rule on the surface of it, but what do you say to those two decisions?

MR. BABER: Your Honor, I don't think Rule 37 requires any finding of bad faith in this situation. You have a violation of a court order. You have --

THE COURT: Have you read those two decisions?

MR. BABER: If they cited them in their brief --

THE COURT: Come on. Answer the question.

MR. BABER: I don't recall them. If they cited them --

THE COURT: They did cite them. I have got them written down here somewhere. Hang on a minute. She did cite them.

You ought to come prepared next time.

MR. BABER: I apologize, Your Honor.

THE COURT: *Fair Housing of Marin*, 285 F.3d -- she did cite it.

MR. BABER: Yes, Your Honor.

THE COURT: The other one is *US vs. Kapalua Construction*. So, you know -- all right. If you can't help me with those two decisions, I just want to know what -- your spin on what those two decisions hold, but if you're not prepared on that, okay.

MR. BABER: I'm not, Your Honor, but I believe in this case, even if there is some requirement of bad faith or willfulness or intent, I think you only need to look at what happened as soon as Mr. Van Nest called out that day in front of Judge Ryu that confidential information had been disclosed. Did Ms. Hurst say, *Oh, you're right. Sorry. Should be under seal*? No, she didn't. She said, *Well, yes, that's in a*

deposition. It's confidential. But there has been a lot of public reports, you know, about this. She dissembled.

That is not what the Court and parties should expect from a lawyer who has just been told *Hey, you disclosed confidential information.* That was part one. That was intentional on her part. She -- I don't know what she was thinking. We just heard from Ms. Haag about --

THE COURT: If it's so clear-cut, then why didn't Judge Ryu seal it?

MR. BABER: Because of what Ms. Hurst said, Your Honor. If Ms. Hurst had said, *Yes, Judge Ryu, I'm sorry, I shouldn't have done that, it should be sealed*, I don't know what Judge Ryu would have done, but I strongly suspect she would have sealed it, especially because she later did seal it once she saw the declarations from Apple and from Google and Oracle not disputing that it was designated confidential. I have got to believe Judge Ryu would not simply have taken it under advisement if Ms. Hurst said -- right away acknowledged, like she should have, *Sorry, that is confidential under the protective order.*

It got worse then, Your Honor. If you look at Ms. Hurst's first declaration -- she left it out in later declarations she's filled, but she put in her first declaration with Oracle's first filing on the motions to seal it that as she left the court that day, she realized there was a reporter

there. It was a reporter she recognized. Did she do anything about that? Did she tell anybody about that? Did she mention it to Judge Ryu or the Google lawyers? No.

THE COURT: But the order on remedies -- the order does not call out that she had to do something to the newspaper reporter. It says that she has got to help retrieve copies.

MR. BABER: Part of it is retrieving copies.

THE COURT: Which other part of it would cover this aspect?

MR. BABER: Okay. Paragraph 12 has several parts to it. It says, "If you learn that there has been a disclosure to someone who is not authorized, you have to, A, immediately notify in writing the other party of the unauthorized disclosures."

THE COURT: In this case, it was done in their presence, so that's not necessary. They knew.

MR. BABER: Your Honor, I don't know that anybody other than Ms. Hurst knew the person was, in fact, a reporter. I don't know who was in the courtroom that day. There is no record on who was actually present, other than the reporter Ms. Hurst recognized.

THE COURT: It doesn't say you have to disclose who's in the -- everybody knew who was in the courtroom -- that people were in the courtroom.

What is next?

MR. BABER: "C, you are supposed to immediately inform the person or persons to whom unauthorized disclosures were made of all the terms of this order."

She didn't do that.

D, she is supposed to "immediately request such person or persons to execute the acknowledgment and agreement to be bound that's attached to the protective order."

THE COURT: You are saying she should have gone to the newspaper reporter and said *You're bound by this order*?

MR. BABER: Your Honor, she should have done that. She should have given the Google lawyers and Judge Ryu a heads-up if they were still in the courtroom that, you know, *I just realized there is a reporter back here.* You know -- and Judge Ryu might have -- I don't know what Judge Ryu would have done in those circumstances. She might have said, *Let me caution everybody about what you heard*, etc. At least Google would have known that, in fact, there had been a disclosure.

THE COURT: Didn't Google know full and well that there was a newspaper reporter there? I'm sure that Mr. Van Nest knew who was in the courtroom.

MR. BABER: I do not know, Your Honor --

THE COURT: Maybe that's your problem if you don't know. Next time you should know. I bet you Mr. Van Nest knew that that was a newspaper reporter.

MR. BABER: I don't know, and there is no record on

that, Your Honor.

THE COURT: There may be no record. All I know is -- I bet there are newspaper people -- they come to all these hearings, and the -- the newspaper -- you just assume that there is a newspaper person in the courtroom.

MR. BABER: Your Honor, just to finish out the thread, though, we were talking about whether what happened here was bad faith, willful, intentional. I want to just note first that it would be -- I find Oracle's argument ironic that they don't want a finding of contempt because contempt is a bad word.

It's very clear under Ninth Circuit law, violation of a court order is contempt, and there is no good faith exception to contempt. Your Honor has cited that in a number of orders. That's just law. You don't have to have bad faith for contempt. And you are entitled to sanctions under the civil contempt laws for damages such as the kinds of expense Google was put to. They don't want that.

But then they say, *Well, under Rule 37, you've got to show we were bad actors. We acted intentionally and willfully.* Well, Your Honor, they did. If you got a letter from opposing counsel -- it's just like a clawback letter under the protective order. If you get a letter from opposing counsel that says, *Hey, you disclosed confidential information last week, join us in an immediate motion to seal,* what's to think

about? They say, *Well, we were thinking about it* --

THE COURT: They didn't object.

MR. BABER: Well --

THE COURT: You're saying it would have been better to say, *We affirmatively join*, and that's that much better than saying *We don't object*?

MR. BABER: Absolutely, Your Honor. A joint motion to Judge Ryu that just said *The parties agree that these portions of the transcript from last week should be sealed* is -- first of all, would have been far quicker. Second, much more effective. Third, much less expensive for Google than having to file all these motions. And I got to believe, again, if Judge Ryu got a joint motion from the parties that said *You're transcript from last week contains information designated confidential under the protective order* -- we saw it later from her. As soon as she saw the motions, she sealed the file. She said, *I'm going to put this under seal until I have time to sort this out*, and then she later sealed it.

So, yes, a joint motion would have done the trick. I have a high level of certainty. So it is ironic, I think, that Oracle is saying well -- and the protective order -- we should not forget, the protective order itself says that if you violate it, you can be subject to a finding of contempt. That is -- it's explicit. It's in Exhibit A to the protective order. All the experts and all the in-house lawyers and other

people who sign on to the protective order explicitly acknowledge "I agree to comply with and be bound by all the terms of the stipulated protective order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt."

So I said earlier, am I wedded to the word *contempt*? No. Was there a violation of the protective order? Yes. Was there a violation when the disclosure was made in court? Absolutely. Were there additional violations when nothing happened later to try and remedy the effects? Yes. That's why we're here, Your Honor.

We think the Court needs to make clear what the protective order requires of counsel who are entrusted with information, and whether you do it as a contempt, whether you do it under Rule 37, Google is entitled to an award for the amounts they had to spend to get this put under seal and to limit any further damage.

THE COURT: Thank you. I have to take it under submission.

Did you wish to say anything more?

MS. HAAG: Just one thing, Your Honor.

In terms of bad faith in the course of the parties' conduct, everybody took this protective order incredibly seriously. There was huge effort and time and expense to comply with the protective order. All kinds of things had to

be filed under seal, had to be redacted, filed in redacted form and complete form and motions to seal, and, I mean, there was a huge amount of attention paid to the confidential nature of the materials at issue here and complying with the Court's protective order.

So to think that Ms. Hurst and Orrick and Oracle acted in bad faith in this instance just is not consistent with the rest of the course of conduct of this litigation.

This is not a case like -- I think it's ***Fair Housing of Marin*** where the person who was held in conduct repeatedly violated the court order, disregarded it, didn't respect it. In this case, this was one arguable mistake made throughout the course of a very complex litigation.

And so I would ask the Court to not find bad faith, to not impose sanctions against -- and to certainly not find contempt against Ms. Hurst, Orrick, or Oracle.

THE COURT: All right. Thank you. I will look it up myself.

I was going to ask you a research question, but I've got people here for the 11:00 calendar, and I owe them a hearing, too.

Those of you here on the 11:00 calendar, I will be back in five minutes, and this is under submission.

MS. HAAG: Could I ask one more thing, Your Honor? I did bring four additional cases with me on the bad faith issue.

I provided them to Mr. Baber. Is it possible for me to hand them up to the Court as well?

THE COURT: Yes.

MS. HAAG: Thank you.

THE COURT: Just hand them to my law clerk, please.

MS. HAAG: I'll do that.

(Proceedings adjourned at 11:28 a.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, September 26, 2016

Pamela A. Batalo

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
U.S. Court Reporter